

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOWARD DEON WIGGINS,

Defendant-Appellant.

UNPUBLISHED

August 26, 2014

No. 316049

Sanilac Circuit Court

LC No. 13-007108-FC

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

Defendant, Howard Deon Wiggins, appeals as of right his convictions, following a jury trial, of armed robbery,¹ possession of a firearm during the commission of a felony (felony-firearm),² and felon in possession of a firearm.³ The trial court sentenced him as a fourth-offense habitual offender⁴ to serve terms of 28 to 50 years' imprisonment for armed robbery, 2 years' imprisonment for felony-firearm, and 4 to 20 years' imprisonment for felon in possession. We affirm.

I. FACTS

A. BACKGROUND FACTS

Karen Hein, an employee of the Watertown Party Store, testified that the store was robbed at around 8:30 p.m. on October 26, 2012. Thomas Karamon, Sandusky Wal-Mart's asset protection manager, testified that he provided the police with a video recording on the night of the robbery that showed two people standing at the courtesy service desk at 7:35 p.m. Karamon testified that they left the store between 10 and 15 minutes later. Karamon testified that the man in the video was wearing a hoodie that looked brown.

¹ MCL 750.529.

² MCL 750.227b.

³ MCL 750.224f.

⁴ MCL 769.12.

Hein testified that Jody VanEtten, another employee, made a purchase shortly after 8:00 p.m. and left the store. Hein testified that there was a customer in line behind VanEtten who made a purchase with a Bridge card. Jennifer Vincent identified the customer on the store's surveillance video as Cassandra Kelly, her daughter and Wiggins's girlfriend, and testified that she let Kelly borrow her silver 2002 Ford Explorer on October 26, 2012. Detective Mark Ruggles testified that the Bridge card belonged to Wiggins. The receipt for the purchase on Wiggins's card was time stamped 8:07 p.m.

Detective Sergeant James Johnson testified that he reviewed the party store's surveillance videos. Leah Galloway, the party store's owner, testified that the video's time stamp clock was 10 minutes fast. The videos showed a vehicle turn into the party store's parking lot at 8:13 p.m. The driver entered the party store at 8:14 p.m., and left at 8:17 p.m. Johnson testified that the video showed that the vehicle had a three-taillight configuration as it left. Johnson testified that a similar vehicle turned onto M-19 "several minutes later" with a taillight configuration, grill, and wheel consistent with a 2002 Ford Explorer and, from the video, it appeared that the same vehicle had circled around the store.

According to Hein, no one entered the store between Kelly and the robber. Hein was in the kitchen area of the store when the robber "came flying around the corner" with a gun. Hein testified that the gun was a black handgun that was not a revolver, and the robber was wearing a black hoodie, a black knitted ski mask, dark gloves, black pants, and black shoes. Hein testified that the robber waved the gun around and demanded money. Hein opened the till, and the robber took cash out of the register and left. Hein testified that the video surveillance showed the robber pointing his gun at her.

Kaila Cummings testified that she was driving on M-19 near the party store that evening. According to Cummings, she drove past a silver sports utility vehicle parked at Watertown Road and M-19 between 7:30 and 7:50 p.m. She saw the woman in the driver's seat as her headlights shone inside the vehicle. She also saw the passenger area and did not see any passengers. Cummings worked with a sketch artist to make a composite sketch of the face that she saw. Vincent identified the person in the composite sketch as Kelly.

Kevin Haupt testified that he lives about one block from the party store and owns nearby property. According to Haupt, at around 8:30 p.m., he was driving in the area when he noticed a "gray Blazer" sitting in front of one of his houses near a wood pile. He pulled up next to the vehicle and asked the driver if she was looking for wood, but she responded "no." Haupt testified that he only saw one woman in the car, and that he could see the entire party store parking lot from where the vehicle was parked. The woman was holding a phone, but he could not hear whether she was talking on it. He testified that he did not know the make and model of the vehicle, but the photograph of the 2002 Ford Explorer was similar to the vehicle that he saw.

Police Officer Michael Moore testified that, on November 2, 2012, he found a backpack in Kelly and Wiggins's residence that contained nine-millimeter pistol ammunition. Moore testified that paperwork in the backpack had Wiggins's name on it. Moore also found black jeans, a brown hoodie, a ball cap, a pair of brown jersey gloves, and black tennis shoes. Moore testified that he did not find a black hoodie or black ski mask.

Sergeant Paul Rich testified that Wiggins agreed to speak with him on November 2, 2012. According to Rich, Wiggins initially told him that one of Kelly's friends picked them up and drove them to Wal-Mart to buy groceries, but they came home "directly." When Rich asked Wiggins if they made any stops, Wiggins responded that they stopped at the Watertown Party Store and Kelly used his Bridge card. Wiggins told Rich that he stayed in the vehicle with Kelly's friend. Rich testified that Wiggins later told him that they used Kelly's mother's vehicle to drive to Wal-Mart and then to the party store.

The jury found Wiggins guilty of armed robbery and felony-firearm. The trial court entered a conviction of felon in possession of a firearm pursuant to the parties' pretrial stipulation that, if the jury found Wiggins guilty of armed robbery and felony-firearm would automatically convict Wiggins of felon-in-possession.

B. SENTENCING HEARING

The trial court sentenced Wiggins on April 22, 2013. On August 23, 2013, defense counsel filed a motion to correct an invalid sentence, contending that the trial court should not have scored offense variables (OVs) 1 or 14. At a hearing on October 28, 2013, the trial court stated that it had properly assessed Wiggins 15 points under OV 1 because Wiggins had held a gun on a victim during the robbery, and properly assessed Wiggins 15 points under OV 14 because, given Kelly's participation in the robbery, there was a preponderance of the evidence that he was the leader of multiple-offenders.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law.⁵ Thus, this Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction.⁶ We review the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the prosecutor proved the crime's elements beyond a reasonable doubt.⁷

B. LEGAL STANDARDS

An armed robbery occurs when the defendant, "in the course of committing a larceny . . . assaults or puts the person in fear," and possesses a dangerous weapon or causes a person to

⁵ *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992); *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

⁶ *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

⁷ *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

believe that he or she possesses a dangerous weapon.⁸ “[I]dentity is an element of every offense.”⁹

C. APPLYING THE STANDARDS

Wiggins contends that (1) the evidence was not sufficient to sustain his conviction because there was no evidence that he was the robber, and (2) the trial court could not rely on the circumstantial evidence. We reject both contentions.

Wiggins asserts that circumstantial evidence cannot support his conviction unless it leads to the “impelling certainty” that he committed the crime. This Court has previously rejected this argument:

Defendant specifically asserts that because the prosecution’s case rested extensively on circumstantial evidence, he could have been convicted only if that evidence proved the prosecution’s theory of guilt with “impelling certainty.” This is a misstatement of the law. Circumstantial evidence and the reasonable inferences it permits are sufficient to support a conviction, provided the prosecution meets its constitutionally based burden of proof beyond a reasonable doubt.^[10]

Wiggins challenges several components of the circumstantial evidence, including the trustworthiness of Cummings’s and Haupt’s identifications of Kelly and their statements about the absence of a passenger in her vehicle given their viewing angles and the darkness. He also challenges the credibility of Vincent’s statement that the police sketch resembled Kelly; the possible reasons for Wiggins’s conflicting statements about where he was on the October 26, 2012; and the admission of Kelly’s phone records. Wiggins’s arguments all concern the weight of the evidence, not its admissibility. This Court will not interfere with the trier of fact’s role to determine the weight of the evidence or the credibility of the witnesses.¹¹

Here, the prosecution showed that Wiggins and Kelly left the Sandusky Wal-Mart shortly before the robbery. At that time, Wiggins was wearing a black or dark brown hoodie. Kelly purchased an item in the party store with Wiggins’s bridge card shortly before the robbery. Vincent testified that she lent Kelly her silver 2002 Ford Explorer that evening. The jury viewed the surveillance videos. Johnson testified that, from the party store’s video surveillance, a similar vehicle appeared to circle the party store after Kelly’s purchase and before the robbery. Witnesses near the party store around the time of the robbery saw Kelly sitting in a similar vehicle. The witnesses testified that Kelly appeared to be alone. Haupt testified that he could

⁸ MCL 750.529; MCL 750.530.

⁹ *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008).

¹⁰ *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010).

¹¹ *Wolfe*, 440 Mich at 514-515; *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

see the party store's entire parking lot from where Kelly was parked. Hein testified that the robber was wearing a black hoodie, black ski mask, knit gloves, black pants, a dark shirt, and dark shoes. Moore found clothing similar to the clothing worn by the robber in Wiggins's home on November 2, 2012.

The question is not whether the jury could have found that the prosecutor did not meet its burden of proof. Rather, it is whether a rational jury could have found that the prosecutor met its burden of proof given this evidence. Viewing this evidence in the light most favorable to the prosecutor, we conclude that a rational jury could find that the prosecutor proved that Wiggins was the robber. And because Hein testified that the robber used a gun, a rational jury also could conclude that Wiggins used a firearm during the robbery. We conclude that sufficient evidence supported Wiggins's convictions.

III. SENTENCING

A. STANDARD OF REVIEW

This Court reviews the sentencing court's guidelines variable scores for clear error.¹² A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake.¹³ A preponderance of the evidence must support the trial court's determinations.¹⁴ This Court reviews de novo questions of constitutional law.¹⁵

B. CONSTITUTIONALITY OF MICHIGAN'S SENTENCE SCHEME

Wiggins contends that Michigan employs an unconstitutional sentencing scheme under *Alleyne v United States*¹⁶ because the necessary factual determinations are not the product of the jury under Michigan's sentencing scheme. Another panel of this Court has rejected this argument, holding that "[w]hile judicial fact-finding in scoring the sentencing guidelines produces a recommended range for the minimum sentence of an indeterminate sentence, . . . it does not establish a *mandatory minimum*; therefore, the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment right to a jury trial."¹⁷ Principles of stare decisis require us to reach the same result in a case that presents the same or substantially similar issues as in a case that another panel of this Court has decided.¹⁸ Accordingly, we reject Wiggins's argument.

¹² *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

¹³ *Reese*, 491 Mich at 139.

¹⁴ *Osantowski*, 481 Mich at 111.

¹⁵ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹⁶ *Alleyne v United States*, 570 US ____; 133 S Ct 2151; 186 L Ed 2d 314 (2013).

¹⁷ *People v Herron*, 303 Mich App 392, 403-404; 845 NW2d 533 (2013) (citation omitted).

¹⁸ MCR 7.215(C)(2).

C. OV 1

Wiggins contends that the trial court improperly assessed 15 points under OV 1 because there was no evidence that he pointed a firearm toward a victim. We disagree.

OV 1 instructs the trial court to assess 15 points if “[a] firearm was pointed at or toward a victim.”¹⁹ Here, Hein testified that the robber pointed a gun at her. And, as discussed above, there was sufficient evidence from which to infer that Wiggins was the robber. Police officers found live handgun ammunition in Wiggins’s backpack. We conclude that a preponderance of the evidence supported the trial court’s factual finding that Wiggins used an actual gun, and that the trial court did not clearly err when it assessed Wiggins 15 points under OV 1.

D. OV 14

Wiggins contends that the trial court improperly assessed 10 points under OV 14. He asserts that there was no evidence that he was a leader in a multiple-offender situation because Kelly may not have been an offender. We disagree.

OV 14 instructs the trial court to assess 10 points if “[t]he offender was a leader in a multiple offender situation.”²⁰ Here, the prosecutor presented evidence that Wiggins and Kelly, his girlfriend, were at Wal-Mart about 15 minutes before the robbery. Shortly before the robbery, Kelly purchased an item in the party store. Johnson testified that it appeared from the video surveillance that the 2002 Ford Explorer circled the store before the robbery. Haupt testified that Kelly was sitting alone in a car in a location from which she could observe the party store’s parking lot.

Given this evidence, the trial court could properly infer that Kelly scouted the store in preparation for the robbery and intended to drive Wiggins away afterward. The trial court could also infer that Wiggins was the leader because Wiggins had control of the firearm, actually perpetrated the robbery, and had a more extensive criminal history. We are not definitely and firmly convinced that the trial court made a mistake when it found that Kelly was a second offender. We conclude that a preponderance of the evidence supported the trial court’s factual findings, and the trial court did not clearly err when it assessed Wiggins 10 points under OV 14.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

A criminal defendant has the fundamental right to the effective assistance of counsel.²¹ Generally, when reviewing an ineffective assistance of counsel claim, this Court reviews for

¹⁹ MCL 777.31(1)(c).

²⁰ MCL 777.44(1)(a).

²¹ US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

clear error the trial court's findings of fact, and reviews de novo questions of law.²² But a defendant must move the trial court for a new trial or evidentiary hearing to preserve the claim that his or her counsel was ineffective.²³ When the trial court has not conducted a hearing to determine whether a defendant's counsel was ineffective, our review is limited to mistakes apparent from the record.²⁴

B. LEGAL STANDARDS

To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.²⁵ We must presume that counsel provided effective assistance.²⁶ A defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.²⁷

C. APPLYING THE STANDARDS

Wiggins contends that defense counsel was ineffective for failing to challenge various pieces of evidence as irrelevant. Specifically, he asserts that defense counsel failed to ask for a witness identification by lineup, failed to thoroughly challenge Kelly's identification, failed to challenge Kelly's telephone records, and failed to challenge the admission of the bullets in Wiggins's backpack. We reject Wiggins's assertions.

Since Wiggins did not preserve his ineffective assistance of counsel claim, our review is limited to the record.²⁸ Counsel is not ineffective for making futile challenges.²⁹ Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable.³⁰

There is no basis in the record from which this Court could conclude that any of the evidence that Wiggins challenges was irrelevant. The presence of bullets in Wiggins's backpack

²² *LeBlanc*, 465 Mich at 579.

²³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

²⁴ *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

²⁵ *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

²⁶ *Unger*, 278 Mich App at 242.

²⁷ *Pickens*, 446 Mich at 312.

²⁸ See *Riley*, 468 Mich at 139.

²⁹ *Ericksen*, 288 Mich App at 201.

³⁰ MRE 401.

made it more likely that Wiggins possessed a firearm during the robbery. The existence of the sketch made it more probable that Kelly was the woman sitting alone in a vehicle outside the party store's parking lot.³¹ Finally, defense counsel does not identify how Kelly's phone records were irrelevant, much less how their exclusion would have assisted his case. The decision not to challenge evidence may be a matter of trial strategy.³² We conclude that Wiggins has not shown that defense counsel's decision not to challenge these pieces of evidence was objectively unreasonable, nor has Wiggins shown that the exclusion of any of these pieces of evidence would have changed the outcome of his trial.

Regarding the eyewitness identifications of Kelly, defense counsel thoroughly cross-examined the witnesses about their identifications, and explored problems such as the low light levels, brief views, and the witnesses' viewing angles. There is no indication in the record that an expert in eyewitness investigation would have been a more reasonable way to impeach the witnesses' testimonies than through cross-examination. We conclude that Wiggins has not shown that defense counsel's failure to call an expert witness in identification was unreasonable or prejudicial.

V. CONCLUSION

We conclude that the prosecutor presented sufficient evidence from which a rational jury could find that Wiggins committed armed robbery. We also conclude that Wiggins's assertions that Michigan's sentencing scheme is unconstitutional, that the trial court improperly scored sentencing guidelines variables, and that defense counsel rendered ineffective assistance are meritless.

We affirm.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot

³¹ See *People v Bills*, 53 Mich App 339, 349; 220 NW2d 101 (1974), rev'd on other grounds 396 Mich 802 (1976) (a composite sketch is the product of a description more reliable than an in-court identification).

³² See *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008) (there are times when it is appropriate not to make even meritorious objections).